

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION**

STATE OF TEXAS, et al.,

Plaintiffs,

V.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Defendants,

BAYOU CITY WATERKEEPER,

Intervenor-Defendant.

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No. 3:23-cv-17 (consolidated
with No. 3:23-cv-20)

FEDERAL DEFENDANTS' STATUS REPORT

Pursuant to this Court’s July 10 Order, Dkt. No. 81, Federal Defendants (“the Agencies”) submit this 45-day status report.

1. In these consolidated cases, Plaintiffs challenge the *Revised Definition of “Waters of the United States,”* 88 Fed. Reg. 3004 (“2023 Rule” or “Rule”).

2. Plaintiffs, the State of Texas, five Texas state agencies, and the State of Idaho (“States”), and eighteen trade associations (“Associations”) moved to preliminarily enjoin the Rule. On March 19, this Court granted the States’ motion and denied the Associations’ motion. Dkt. No. 60 at 2.

3. As a result of this Court’s March 19 Order, as well as the District of North Dakota’s order in *West Virginia v. EPA*, No. 3:23-cv-0032 (D.N.D.), Dkt. No. 131, and

the Sixth Circuit’s order in *Kentucky v. EPA*, No. 23-5345 (6th Cir.), Dkt. No. 28, the 2023 Rule is currently enjoined in 27 states, including Texas and Idaho. *See* Mot. to Stay Case, Dkt. No. 80 at 1-2 (Background).

4. On May 25, the Supreme Court issued its ruling in *Sackett v. EPA*, 143 S. Ct. 1322 (2023), which addresses the standard for determining what constitutes “waters of the United States.” Shortly thereafter, the Agencies publicly stated that they are interpreting the phrase “waters of the United States” consistent with *Sackett*. *See* Dkt. No. 80-1, Declaration of Radhika Fox ¶¶ 7-8 (“Fox Decl.”); Dkt. No 80-2, Declaration of Michael L. Connor ¶¶ 6-7 (“Connor Decl.”).

5. In June, the Agencies announced that they are developing a new rule to conform the definition of “waters of the United States” with *Sackett*, and that the Agencies intend to issue a final rule on or before September 1, 2023. Fox Decl. ¶¶ 9-10; Connor Decl. ¶¶ 8-9; *see also* EPA, *Amendments to the 2023 Rule*, <https://www.epa.gov/wotus/amendments-2023-rule> (last visited Aug. 24, 2023); Corps, *UPDATED Supreme Court Ruling in Sackett v. Environmental Protection Agency*, <https://www.usace.army.mil/Media/Announcements/Article/3440421/27-june-2023-update-supreme-court-ruling-in-sackett-v-environmental-protection/> (June 27, 2023).

6. Plaintiffs filed motions for summary judgment on June 28. Dkt. Nos. 78 & 79.

7. The Agencies sought a stay of these consolidated cases until after the new rule is published, Dkt. No. 80, which this Court granted, Dkt. No. 81.

8. All litigation challenging the 2023 Rule is currently stayed until after the new rule is published. *See* Dkt. No. 81; *Texas v. EPA*, No. 23-40306, Dkt. No. 29-2 (5th Cir.); *West Virginia v. EPA*, No. 3:23-cv-32, Dkt. No. 151 (D.N.D.); *West Virginia v. EPA*, No. 23-2411, Dkt. No. 5296015 (8th Cir.); *Kentucky v. EPA*, No. 23-5343, Dkt. No. 28, *consolidated with* 23-5345, Dkt. No. 32 (6th Cir.) (orders granting stays).

9. The Office of Management and Budget received the new rule, titled *Amendments to the “Revised Definition of ‘Waters of the United States,’”* on July 17. OMB, <https://www.reginfo.gov/public/do/eoDetails?rrid=324261> (last visited Aug. 22, 2023). The new rule cleared regulatory review on August 17. *Id.*

10. The Agencies intend to sign the new rule by September 1. The Agencies will then submit the rule for publication in the Federal Register. Fox Decl. ¶ 10; Connor Decl. ¶ 9.

11. The Agencies will promptly notify the Court and the Parties when the new rule is published in the Federal Register. The Agencies will confer with the Parties to submit a proposal or proposals for further proceedings within 21 days after the new rule’s publication.

12. The Agencies will submit a status report on or before October 10, 2023, if the new rule has not yet been published in the Federal Register, and every 45 days thereafter for the duration of the stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2023, I filed the foregoing using the Court's CM/ECF system, which will electronically serve all counsel of record registered to use the CM/ECF system.

/s/ Sonya J. Shea